Filed 2/16/05 Kellner v. Quisenberrey Law Firm CA2/5

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

JAMES L. KELLNER et al., Plaintiffs and Respondents, v. THE QUISENBERRY LAW FIRM et al., Defendants and Appellants.	B173896 (Los Angeles County Super. Ct. No. BC300739)

APPEAL from an order of the Superior Court of Los Angeles County, Edward A. Ferns, Judge. Reversed and remanded with directions.

Murphy Rosen & Cohen, Paul D. Murphy and Katharine A. Kates for Defendants and Appellants.

Contreras & Campa, and Drago Campa for Plaintiffs and Respondents.

I. INTRODUCTION

Defendants, the Quisenberry Law Firm, Quisenberry & Kabateck, John Quisenberry, Brian Kabateck, Jerilyn Jacobs, Elizabeth Green, Erin Moore, and Heather Mason McKeon, appeal from an order denying their special motion to strike a malicious prosecution action brought by plaintiffs, James L. Kellner and Brian Kellner. We find plaintiffs, in the brief declarations they filed in the trial court, failed to establish the requisite minimal merit of their malicious prosecution claim. Specifically, plaintiffs failed to present a prima facie showing defendants acted maliciously. Accordingly, we reverse the order denying defendants' special motion to strike. Upon issuance of the remittitur, the trial court is to enter an order granting the special motion to strike and addressing any attorney fee contentions defendants may wish to pursue.

II. BACKGROUND

This malicious prosecution action arises out of two underlying lawsuits. In the first underlying action, a landowner brought an unlawful detainer action against Michael J. Larivee who, along with a business partner, was a tenant. James,[1] an attorney, represented the landowner. Brian was the process server who purportedly served Mr. Larivee with a three-day unlawful detainer notice to pay rent and, later, the summons and complaint. A default judgment was entered against Mr. Larivee. Mr. Larivee's subsequent attempt to vacate that default judgment failed. The trial court found the motion was untimely.

In the second underlying action, Mr. Larivee sued James and Brian among others. Mr. Larivee alleged fraud and negligent misrepresentation in connection with the default judgment entered against him. This second underlying action ultimately triggered the

present malicious prosecution lawsuit. Mr. Larivee alleged that contrary to the proofs of service in the unlawful detainer action, he was not personally served with the three-day notice to pay rent or quit or the summons and complaint. Mr. Larivee alleged the proofs of service were signed by Brian. Further, it was alleged the default entry request had been mailed to the long-vacated business property even though James had a current home address for Mr. Larivee's business partner. Also, the complaint in the second underlying action alleged James knowingly failed to notify Mr. Larivee or a business partner of the unlawful detainer notice and the request for entry of a monetary judgment. Plaintiffs, who were the defendants in the fraud action, filed a judgment on the pleadings motion. The judgment on the pleadings motion was granted on Civil Code section 47, subdivision (b) litigation privilege grounds. Mr. Larivee chose not to amend his fraud complaint as to plaintiffs.

Plaintiffs then filed the present malicious prosecution lawsuit against defendants, the attorneys who represented Mr. Larivee in his fraud action. Defendants filed a Code of Civil Procedure section 425.16[2] special motion to strike. The trial court denied the special motion to strike finding that plaintiffs had established a probability of prevailing on the merits in that the fraud action was maliciously filed without probable cause.

---

[1] To avoid confusion and not out of any disrespect, we refer to plaintiffs James and Brian Kellner by their first names.

[2] All future statutory references to a section are to the Code of Civil Procedure unless otherwise indicated.

III. DISCUSSION

A. Preliminary Matters

1. Plaintiffs' brief on appeal is inadequate

Plaintiffs' counsel has filed, beyond the deadline set by the court, a four-page respondents' brief that is devoid of any cognizable argument. The brief does not comply with California Rules of Court, rule 14(a). Moreover, it is well established that on appeal plaintiffs cannot rely on briefs filed in the *trial court*. (E.g., *Banning v. Newdow* (2004) 119 Cal.App.4th 438, 455; *Paterno v. State of Calif.* (1999) 74 Cal.App.4th 68, 109; *Garrick Development Co. v. Hayward Unified School Dist.* (1992) 3 Cal.App.4th 320, 334; *Balesteri v. Holler* (1978) 87 Cal.App.3d 717, 720-721.) Under these circumstances, any argument plaintiffs might have raised on appeal has been waived. (*People v. Barnett* (1998) 17 Cal.4th 1044, 1107, fn. 37; *North American Building-Loan Ass'n. v. Richardson* (1936) 6 Cal.2d 90, 102; *Estate of Randall* (1924) 194 Cal. 725, 728-729; *Pringle v. La Chapelle* (1999) 73 Cal.App.4th 1000, 1003-1004 & fn. 2; *Badie v. Bank of America* (1998) 67 Cal.App.4th 779, 784-785.)

2. Evidentiary objections

The parties filed evidentiary objections in the trial court. The trial court did not rule on those objections. Defendants did not attempt to secure a ruling on their objections. As a result, any assertion that could have been raised with respect thereto has been waived. (E.g., *Johnson v. City of Loma Linda* (2000) 24 Cal.4th 61, 65-66; *Sharon P. v. Arman, Ltd.* (1999) 21 Cal.4th 1181, 1186-1187, fn. 1, disapproved on another point in *Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 854; *Laird v. Capital Cities/ABC, Inc.* (1998) 68 Cal.App.4th 727, 736; compare, *City of Long Beach v.*

Farmers & Merchants Bank of Long Beach (2000) 81 Cal.App.4th 780, 784-785.) The trial court, at the hearing on the special motion to strike, declined to consider plaintiffs' evidentiary objections as not timely filed. After the trial court issued its minute order, plaintiffs filed a request for rulings on their objections. However, plaintiffs have not raised any issue on appeal with respect to their evidentiary objections. Any such issues have been waived.

B. The Special Motion to Strike

1. Section 425.16 and the standard of review

A special motion to strike may be filed in response to "'a meritless suit filed primarily to chill the defendant's exercise of First Amendment rights.'" (*Dove Audio, Inc. v. Rosenfeld, Meyer & Susman* (1996) 47 Cal.App.4th 777, 783, quoting *Wilcox v. Superior Court* (1994) 27 Cal.App.4th 809, 815, fn. 2, disapproved on another point in *Equilon Enterprises v. Consumer Cause, Inc.* (2002) 29 Cal.4th 53, 68, fn. 5.) The purpose of the special motion to strike statute is set forth in section 425.16, subdivision (a), as follows: "The Legislature finds and declares that there has been a disturbing increase in lawsuits brought primarily to chill the valid exercise of the constitutional rights of freedom of speech and petition for the redress of grievances. The Legislature finds and declares that it is in the public interest to encourage continued participation in matters of public significance, and that this participation should not be chilled through abuse of the judicial process. . . ." Under section 425.16, any cause of action against a person "arising from any act . . . in furtherance of the . . . right of petition or free speech . . . ," in connection with a public issue must be stricken unless the court finds a "probability" that the plaintiff will prevail on whatever claim is involved. (§ 425.16, subd. (b)(1); *Equilon Enterprises v. Consumer Cause, Inc., supra,* 29 Cal.4th at p. 67; *Dowling v. Zimmerman* (2001) 85 Cal.App.4th 1400, 1415.)

Section 425.16, subdivision (e) defines acts in furtherance of free speech or petition rights in connection with a public issue by setting forth four categories of conduct to which the statute applies. Section 425.16, subdivision (e) provides: "As used in this section, 'act in furtherance of a person's right of petition or free speech under the United States or California Constitution in connection with a public issue' includes: (1) any written or oral statement or writing made before a legislative, executive, or judicial proceeding, or any other official proceeding authorized by law; (2) any written or oral statement or writing made in connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other official proceeding authorized by law; (3) any written or oral statement or writing made in a place open to the public or a public forum in connection with an issue of public interest; (4) or any other conduct in furtherance of the exercise of the constitutional right of petition or the constitutional right of free speech in connection with a public issue or an issue of public interest." A specific public interest showing is required for acts claimed to fall under subdivisions (e)(3) and (4), but not for acts claimed to fall under subdivisions (e)(1) and (2). (*Briggs v. Eden Council for Hope & Opportunity* (1999) 19 Cal.4th 1106, 1111-1123; *Du Charme v. International Broth. of Elec. Workers, Local 45* (2003) 110 Cal.App.4th 107, 112-114.)

When a special motion to strike is made, the trial court must consider two components. First, the court must consider whether the moving defendant has carried its burden of showing that the lawsuit falls within the purview of section 425.16, i.e., arises from protected activity. The moving defendant has the initial burden of establishing a prima facie case that plaintiff's cause of action arises out of actions in the furtherance of petition or free speech rights. (§ 425.16, subd. (b)(1); *Equilon Enterprises v. Consumer Cause, Inc., supra,* 29 Cal.4th at p. 67; *Mission Oaks Ranch, Ltd. v. County of Santa Barbara* (1998) 65 Cal.App.4th 713, 721, overruled on another point in *Briggs v. Eden Council for Hope & Opportunity, supra,* 19 Cal.4th at p. 1123, fn. 10.) The moving defendant has no obligation to demonstrate that the plaintiff's subjective intent was to chill the exercise of constitutional speech or petition rights. (*Navellier v. Sletten* (2002)

29 Cal.4th 82, 88; *Equilon Enterprises v. Consumer Cause, Inc., supra,* 29 Cal.4th at pp. 66-67.) Nor must a defendant show that the action had the effect of chilling free speech or petition rights. (*Navellier v. Sletten, supra,* 29 Cal.4th at p. 88; *City of Cotati v. Cashman* (2002) 29 Cal.4th 69, 75-76.)

Second, once the defendant meets this burden, the obligation shifts to the plaintiff to establish a probability of prevailing on the merits. (§ 425.16, subd. (b)(1); *Equilon Enterprises v. Consumer Cause, Inc., supra,* 29 Cal.4th at p. 67; *Briggs v. Eden Council for Hope & Opportunity, supra,* 19 Cal.4th at p. 1115.) As to the second step of the special motion to strike process, the Supreme Court in *Wilson v. Parker, Covert & Chidester* (2002) 28 Cal.4th 811, 821, described the trial judge's duties as follows: "In deciding the question of potential merit, the trial court considers the pleadings and evidentiary submissions of both the plaintiff and the defendant (§ 425.16, subd. (b)(2)); though the court does not *weigh* the credibility or comparative probative strength of competing evidence, it should grant the motion if, as a matter of law, the defendant's evidence supporting the motion defeats the plaintiff's attempt to establish evidentiary support for the claim. [Citation.]" (Orig. italics; see *Paul for Council v. Hanyecz* (2001) 85 Cal.App.4th 1356, 1365, disapproved on another point in *Equilon Enterprises v. Consumer Cause, Inc., supra,* 29 Cal.4th at p. 68, fn. 5.) The plaintiff has a duty to demonstrate that the course of action has minimal merit. (*Jarrow Formulas, Inc. v. LaMarche* (2003) 31 Cal.4th 728, 740; *Navellier v. Sletten*, *supra*, 29 Cal.4th at p. 94.) We conduct an independent review of the trial court's decision. (*Paul for Council v. Hanyecz, supra,* 85 Cal.App.4th at p. 1364; *Mission Oaks Ranch, Ltd. v. County of Santa Barbara, supra,* 65 Cal.App.4th at p. 721.) Whether a plaintiff has established a prima facie case is a question of law. (*Zamos v. Stroud* (2004) 32 Cal.4th 958, 965; *Wilson v. Parker, Covert & Chidester, supra,* 28 Cal.4th at p. 821.)

Plaintiffs concede defendants met their burden under the first prong of section 425.16. The malicious prosecution claim arises out of defendants' actions in furtherance of their petition rights. Defendants' representation of plaintiffs' opponent in the

underlying action was an act in furtherance of constitutional petition rights. (*Jarrow Formulas, Inc. v. LaMarche*, *supra*, 31 Cal.4th at p. 734; *Jespersen v. Zubiate-Beauchamp* (2003) 114 Cal.App.4th 624, 629.)

The elements of a malicious prosecution claim are well established. The plaintiff must show: the underlying action was commenced by the defendant or at his or her direction and was pursued to a legal termination in the plaintiff's favor; the underlying action was brought without probable cause; and the underlying action was *initiated with malice*. (*Zamos v. Stroud, supra,* 32 Cal.4th at pp. 965-966; *Crowley v. Katleman* (1994) 8 Cal.4th 666, 676; *Sheldon Appel Co. v. Albert & Oliker* (1989) 47 Cal.3d 863, 871-872.) We need not reach the question whether plaintiffs established a probability of prevailing on their assertion the underlying action was brought without probable cause. Because favorable termination and malice are also necessary elements of the claim, the cause of action may lack merit even when the plaintiff can prove lack of probable cause. (*Jarrow Formulas, Inc. v. LaMarche*, *supra*, 31 Cal.4th at p. 739.) Plaintiffs did not establish the minimal merit of their claim the underlying fraud action was initiated with malice.

In *Sheldon Appel Co.*, the Supreme Court has held: "The 'malice' element of the malicious prosecution tort relates to the subjective intent or purpose with which the defendant acted in initiating the prior action, and past cases establish that [ordinarily] the defendant's motivation is a question of fact to be determined by the jury. (See, e.g., *Runo v. Williams* (1912) 162 Cal. 444, 450 []; see generally Rest.2d Torts, § 681B, subd. (2)(b).)" (*Sheldon Appel Co. v. Albert & Oliker, supra,* 47 Cal.3d at p. 874.) The Supreme Court has stated, "[T]he malice element is directly concerned with the *subjective* mental state of the defendant in instituting the prior action . . . ." (*Id.* at p. 878, italics orig.) Moreover, "'Merely because the prior action lacked legal tenability, as measured objectively . . . *without more*, would not logically or reasonably permit the inference that such lack of probable cause was accompanied by the actor's subjective malicious state of mind.' (*Downey Venture v. LMI Ins. Co.* (1998) 66 Cal.App.4th 478,

498 [], citing *Sheldon Appel Co., supra*, 47 Cal.3d at pp. 885-886 [].)" (*Jarrow Formulas, Inc. v. LaMarche, supra,* 31 Cal.4th at p. 743; orig. italics.)

In their brief on appeal, as discussed above, plaintiffs present no argument or citation to the record with respect to whether they established a probability of prevailing on the malice element of their malicious prosecution claim. In the trial court, the brief declarations filed in opposition presented no indication defendants acted maliciously. Plaintiffs' points and authorities argued that when Mr. Larivee filed the underlying fraud action, his attorneys "falsely state[d]" they were not aware of any related cases. Plaintiffs had filed a legal malpractice action against an attorney who represented Mr. Larivee in attempting to set aside the unlawful detainer default judgment. In *Jarrow Formulas, Inc.*, as quoted above, the Supreme Court set forth the controlling rule when all that is demonstrated in malicious prosecution litigation is an absence of probable cause: '"Merely because the prior action lacked legal tenability, as measured objectively . . . *without more,* would not logically or reasonably permit the inference that such lack of probable cause was accompanied by the actor's subjective malicious state of mind.' (*Downey Venture v. LMI Ins. Co.*[, *supra*,] 66 Cal.App.4th [at p.] 498, citing *Sheldon Appel Co., supra,* 47 Cal.3d at pp. 885-886.)" (*Jarrow Formulas, Inc. v. LaMarche*, *supra*, 31 Cal.4th at p. 743; original italics.) Solely for purposes of discussion, we accept the proposition that there was a minimal merit showing of the absence of probable cause claim element. That being said, the brief declarations submitted by plaintiffs presented no evidence from which even a slight inference of malice can be derived.

We note that the trial court ruled on the special motion to strike prior to the Supreme Court in *Jarrow Formulas, Inc.* clarifying the limited nature of the inference of malice that may be drawn from an unreasonably commenced lawsuit in the section 425.16 context. Stated differently, the law changed while this case was on appeal. Had the clarification in *Jarrow Formulas, Inc.* existed when the trial court ruled, we have no doubt the special motion to strike would have been granted.

Finally, at oral argument we raised the question of whether the Supreme Court in *Zamos v. Stroud*, *supra*, 32 Cal.4th at pages 961-973, addressed the malice issue. In *Zamos*, the Supreme Court stated the issue before it thusly: "The question presented by this case is whether, assuming the other elements of the tort are established, an attorney may be held liable for malicious prosecution when he *commences* a lawsuit properly but then *continues* to prosecute it after learning it is not supported by probable cause. We conclude an attorney may be held liable for continuing to prosecute a lawsuit discovered to lack probable cause." (*Id*. at p. 960; original italics.) The Supreme Court never discussed the issue of whether the plaintiff made the requisite minimal merits showing that malice was present when the underlying suit was pursued. (*Id*. at pp. 961-973.) Supreme Court opinions are not authority for propositions not addressed therein. (*People v. Scheid* (1997) 16 Cal.4th 1, 17; *Ginns v. Savage* (1964) 61 Cal.2d 520, 524, fn. 2.) *Zamos* has no bearing on the malice issue.

IV. DISPOSITION

The order denying the special motion to strike filed by defendants, the Quisenberry Law Firm, Quisenberry & Kabateck, John Quisenberry, Brian Kabateck, Jerilyn Jacobs, Elizabeth Green, Erin Moore, and Heather Mason McKeon, is reversed. The trial court is directed, upon issuance of the remittitur, to enter a new order granting the special motion to strike. Defendants are to recover their costs and attorney fees on

appeal and those incurred in the trial court in litigating the special motion to strike from plaintiffs, James L. Kellner and Brian Kellner.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

TURNER, P.J.

We concur:

MOSK, J.

KRIEGLER, J.*

---

* Judge of the Superior Court of Los Angeles County, assigned by the Chief Justice pursuant to article VI, section 6, of the California Constitution.